

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

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NATIONAL CREDIT UNION ADMINISTRATION
BOARD, as Liquidating Agent of U.S. Central Federal
Credit Union, Western Corporate Federal Credit Union,
Members United Corporate Federal Credit Union,
Southwest Corporate Federal Credit Union, and
Constitution Corporate Federal Credit Union,
in its own right, and on behalf of NCUA

GUARANTEED NOTES TRUST 2010-R1, NCUA
GUARANTEED NOTES TRUST 2010-R2, NCUA
GUARANTEED NOTES TRUST 2010-R3, NCUA
GUARANTEED NOTES TRUST 2011-R1, NCUA
GUARANTEED NOTES TRUST 2011-R2, NCUA
GUARANTEED NOTES TRUST 2011-R3, NCUA
GUARANTEED NOTES TRUST 2011-R4, NCUA
GUARANTEED NOTES TRUST 2011-R5, NCUA
GUARANTEED NOTES TRUST 2011-R6, NCUA
GUARANTEED NOTES TRUST 2011-M1,

Plaintiffs,

-against-

DEUTSCHE BANK NATIONAL TRUST CO.,

Defendant,
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Case No. 14-cv-08919-SHS

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR
MOTION TO STRIKE PARTS I-III OF DEUTSCHE BANK'S REPLY (DKT. 132)**

Pursuant to Federal Rules of Civil Procedure 7(b) and Local Civil Rule 7.1, plaintiff National Credit Union Administration Board, as liquidating agent, and putative plaintiff Graeme W. Bush, as Separate Trustee (together, "Plaintiffs"), respectfully move to strike Parts I-III of Trustee Deutsche Bank's recently filed reply brief. *See* DB Reply, Dkt. 132 (Dec. 19, 2018).

The scheduling order entered by this Court provided that Deutsche Bank's reply brief was to be "limited to arguments regarding futility of amendment by reference to Rule 12." Dkt.

111 at 1 (Oct. 1, 2018). In the three briefs filed before that, the parties were to conclude any and all briefing on Plaintiffs’ “motion for leave to amend pursuant to Rules 15 and 17,” focusing on substitution of the real parties in interest following the Second Circuit’s August 2018 ruling. *Id.*

In Parts I-III (pages 1-10) of Deutsche Bank’s reply brief, however, the Trustee submits an unauthorized sur-reply on the Rule 15 and 17 issues. For example, Plaintiffs’ opening brief extensively discussed Judge Failla’s decision allowing substitution in *Wells Fargo II*. Pls. Br., Dkt. 113 (Oct. 5, 2018). But the Trustee chose to ignore that decision entirely in its authorized brief in opposition to the Rule 15 and 17 issues. *See* DB Opp’n at iii-vii, Dkt. 118 (Nov. 5, 2018) (*no* citation of *Wells Fargo II*); Pls. Reply at 2, Dkt. 126 (Dec. 5, 2018) (noting the same). The Trustee’s unauthorized sur-reply then cites *Wells Fargo II* 12 times (“*passim*”) in Parts I-III. DB Reply at ii, Dkt. 132 (Dec. 19, 2018). Those Parts should be stricken from the record.

Deutsche Bank’s tactic was plainly to omit many Rule 15 and 17 arguments from its authorized opposition and then lodge them in its final brief. (Deutsche Bank took a similarly improper approach in conjunction with its motion to stay Plaintiffs’ indemnity claims. *See* Pls. Letter Request to Strike Docket 130 from the Record, Dkt. 131 (Dec. 7, 2018)). Such sandbagging flouts the Court’s scheduling order as well as the customary procedure by which the moving party gets the last word. Plaintiffs were the moving parties on the Rule 15 and 17 issues concerning substitution of real parties in interest, and the Trustee was the moving party on the Rule 12 issues concerning whether Plaintiffs state claims on the merits. For that reason, the scheduling order expressly limited Deutsche Bank’s reply to the Rule 12 issues.

The scheduling order was clear, and Deutsche Bank chose to disregard it. The Court should strike Parts I-III of Deutsche Bank’s reply.

Dated: December 21, 2018

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send a Notice of Electronic Filing upon all counsel of record.

/s/ Scott K. Attaway
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